UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. ALCAN INC., ALCAN ALUMINUM CORP., PECHINEY, S.A., and PECHINEY ROLLED PRODUCTS, LLC, *Defendants.*	Case No. 1:030 CV 02012-GK Judge Gladys Kessler Deck Type: Antitrust

UNITED STATES'S REPLY TO INTERVENOR STATE OF WEST VIRGINIA'S OPPOSITION TO ENTRY OF THE PROPOSED AMENDED FINAL JUDGMENT

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INTRODUCTION AND SUMMARY

The proposed Amended Final Judgment ("AFJ") submitted for entry in this case would resolve the United States's concerns that Alcan's acquisition of Pechiney would significantly limit competition in development, production, and sale of brazing sheet, a unique aluminum alloy used by parts makers to produce heat exchange systems (*e.g.,* radiators, heaters, and air conditioning units) for motor vehicles.[1] The AFJ would do this by requiring Alcan to divest either its own or Pechiney's "brazing sheet business." AFJ, § IV(A).[2] A prompt divestiture of either brazing sheet business to a viable new competitor unquestionably would advance the public interest in continued competition in the $360 million domestic brazing sheet market by restoring the heated rivalry that existed in sales of this crucial material before Alcan's acquisition of Pechiney. To ensure that the mandated divestiture is completed expeditiously, the AFJ provides that if Alcan does not complete its sale of either brazing sheet business to an acceptable purchaser by the established deadline, then the United States may seek appointment of a trustee to complete the divestiture of Pechiney's brazing sheet business. AFJ, § V(A). The United States strongly

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[1]Complaint, ¶¶ 1-3, 19-24, and 27-30; Revised Competitive Impact Statement at 4-9.

[2]"Alcan's brazing sheet business" includes Alcan's aluminum rolling mills in Oswego, New York, and Fairmont, West Virginia, which produce the brazing sheet sold by Alcan in North America. AFJ, § II(F). "Pechiney's brazing sheet business" includes its aluminum rolling mill in Ravenswood, West Virginia, which makes the brazing sheet sold by Pechiney in North America. AFJ, § II(E). Alcan has notified the government that it would sell its own brazing sheet operations only as part of a major corporate reorganization, an undertaking driven, at least in part, by business considerations unrelated to Alcan's acquisition of Pechiney. *See* Revised Competitive Impact Statement, n. 3.

believes that the AFJ is in the public interest,[3] and that the Court should enter it promptly and bring this long-settled case to an end.

The State of West Virgnia has intervened in this Tunney Act proceeding based on the possibility, however remote,[4] that Pechiney's brazing sheet business may someday be owned by someone other than Alcan. West Virginia's principal claim is that the AFJ is "unnecessary" because Alcan's acquisition of Pechiney was not anticompetitive.[5] The state has raised a litany of defenses to Alcan's acquisition of Pechiney, *viz.,* that the relevant product is not brazing sheet

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[3]The United States has published the proposed settlement, and received, evaluated, and responded to the eight public comments that were submitted. It has arranged to have the comments and responses published in the Federal Register, which would complete the government's Tunney Act obligations. 15 U.S.C. §§16(b)-(h). *See* United States's Revised Certificate of Compliance with the Antitrust Penalties and Procedures Act. Defendants will soon file their certification of contacts with government officials. 15 U.S.C. §15(g). After publication of the comments and responses, the United States will move the Court to enter the AFJ and to dismiss the Amended Complaint of Intervenor the State of West Virginia (hereinafter, "Intervenor's Amended Complaint") for failure to state a claim upon which relief can be granted.

[4]Apparently pursuing a path of least resistance, Alcan has chosen to divest its own brazing sheet business under the AFJ as part of a massive $6 billion spin-off of its Rolled Aluminum Products division, an enterprise that includes aluminum smelting operations and rolling mills in the United States, Europe, and Asia. This proposed stockholder spin-off, scheduled to be completed this December, is intended, inter alia, to satisfy competitive concerns raised by antitrust enforcement agencies both in Europe and the United States over Alcan's acquisition of Pechiney. Alcan announced the proposed spin-off in May, assembled a management team for the spinoff company in June, and will soon submit required regulatory filings to the responsible government agencies, including the U.S. Securities and Exchange Commission. See C. Chipello, *Alcan Says It Plans to Spin Off Its Rolled Products Businesses*, Wall St. J., May 19, 2004, at A2; *Alcan Winds Off List of New Rolled Product Management*, Canada Stockwatch, June 6, 2004, 2004 WL 81889962; *Alcan to Spin Off Rolled Products Unit, Reviews Expressions of Interest*, Canadian Press, Sept. 15, 2004.

[5]Intervenor Complaint, ¶ 8 ("[D]ivestiture of Pechiney's brazing sheet business . . . is unnecessary" since "competition would remain vigorous . . . and no injury to competition would result" if "Alcan were to continue to own" it); Opposition Mem. of Intervenor the State of West Virginia to the Proposed Amended Final Judgment ("Mem. In Opp.") at 7-14; and Affidavit of Donald E. Waldie, ¶¶ 7, 9-10.

(Mem. In Opp. at 4-7); the relevant geographic market is not North America (*id.* at 9); entry into the brazing sheet market is not difficult (*id.*); the acquisition did not substantially lessen competition because brazing sheet customers are "power buyers," who can protect themselves against future anticompetitive pricing (*id.* at 9-13); and that Pechiney is a "failing firm," which can be kept alive only by Alcan (*id.* at 3-4, 15-16). The state also variously contends that the terms of the proposed AFJ are "defective" because they mandate a "rushed" divestiture (*id.* at 5), do not require a sale of all assets necessary to ensure the buyer's long-term viability (*id.* at 5-7), and fail to impose an affirmative obligation on the purchaser to assume the expiring labor agreements and pension obligations previously negotiated by Pechiney management (*id.* at 3-4).

West Virginia fundamentally misunderstands the purpose of the Tunney Act. No court has ever construed that Act as allowing review of the substantive merits of the antitrust claims made by the United States in its complaint. The Act's purpose, rather, is to ensure that government settlements fully address and remedy the competitive harms that have been alleged. With this in mind, the state has asked this Court to do something truly extraordinary: Conduct a trial on the settled claims of the government's Complaint under the pretext of ascertaining whether entry of the AFJ is in the public interest, although the parties have agreed to an AFJ that would provide virtually all of the relief that the government would likely obtain if it had prevailed at that trial. West Virginia cites no legal precedent for its position because there is none. It has, moreover, offered no reasonable basis for rejecting or otherwise delaying entry of the proposed AFJ.

ARGUMENT

I. The State's Disagreement with the Government as to the Competitive Effects of Alcan's Acquisition of Pechiney Has No Bearing on Whether Entry of the AFJ Would Be in the Public Interest.

Much of the state's opposition to the proposed settlement is an assault on the competitive merits of the government's challenge to Alcan's acquisition of Pechiney. Mem. In Opp. at 7-14. The state, nonetheless, concurs in the government's basic conclusion that the acquisition would create a duopoly by reducing from three to two the number of major competitors in brazing sheet sales in North America. However, in the state's view, brazing sheet customers are large sophisticated buyers – *viz.,* major auto makers such as General Motors – who can avoid (or discipline) any cooperative post-merger price increase by leveraging their purchasing power. West Virginia's analysis of the claims in the government's antitrust case is without merit.[6] More

[6]To begin with, the state incorrectly suggests that domestic auto makers buy large quantities of brazing sheet. Mem. In Opp. at 8-14. In fact, brazing sheet is purchased by independent OEM and replacement parts makers (*e.g.,* Delphi, Visteon, Modine, Calsonic, Valeo, Behr, and Denso), who compete among themselves to supply heat exchange systems (*e.g.,* radiators, heaters, and air conditioning units) not only to domestic auto makers (*e.g.,*GM, Ford, Daimler-Chrysler, Toyota, Honda, Nissan, BMW), but also to firms that make other types of motor vehicles and heavy equipment such as trucks, tractors, drill rigs, and aircraft engines (*e.g.,* Caterpillar, J. Deere, Case IH, Volvo Group, Cummins, Honeywell). Taking into account the structural characteristics of the brazing sheet industry (two major sellers – Alcan and Alcoa – and many buyers post-merger), admissions in defendants' business documents, and credible customer complaints received throughout its merger investigation, the United States reasonably concluded that, in this highly concentrated, difficult-to-enter market, combining a maverick entrant (Alcan) with a large incumbent (Pechiney) would facilitate future anticompetitive increases in brazing sheet prices and diminished product quality and innovation to the detriment of consumers. *See* Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U.L.Rev. 135, 177-79, 201-03 (2002) (eliminating disruptive rival in highly concentrated markets likely will reduce competition significantly and elevate prices). *See also United States v. Alcoa, Inc.,* 2000-2 Trade Cas. (CCH) ¶72,972 (D.D.C. 2000) (J. Hogan) (consent decree in similar case in which the government

to the point, the United States need not prove in Court the major elements of the antitrust Complaint that initiated the case before the Court must rule on the appropriateness of the divestiture relief contained in the proposed AFJ. Indeed, to impose such a rule would turn every settled government antitrust case into a full-blown trial on the substantive merits of the parties' complex legal and factual claims, and seriously undermine the effectiveness of antitrust enforcement by use of consent decrees. Significantly, it would also invite the Court impermissibly to intrude on law enforcement discretion accorded to the Executive Branch.

No court has ever ruled that the Tunney Act authorizes judicial review of the competitive merits of the allegations in the government's complaint. Rather, the District of Columbia Circuit Court of Appeals has emphasized that Executive Branch decisions as to what (if any) violations

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charged that acquisition of an aluminum rolling mill would severely diminish competition by eliminating a pricing maverick).

Indeed, the alleged increase in market concentration as a result of Alcan's acquisition of Pechiney is as egregious as that which the Court found presumptively unlawful in *FTC v. Cardinal Health Inc.,* 12 F.Supp.2d 34, 53 (D.D.C. 1998) (acquisitions that would raise market concentration index above 3000 points "presumed" to "pose risk to competition;" the concentration index in this case would rise over 600 points to exceed 3600 post-acquisition, Complaint, ¶ 20). Actually, that index *understates* the transaction's competitive significance since Alcan's acquisition would transform the domestic brazing sheet market into a virtual duopoly. *Id.*, ¶¶ 22 and 23; Revised Competitive Impact Statement at 5-6 (capacity-constrained smaller rivals unable to discipline a significant post-merger price increase by Alcan and the other major incumbent). *See FTC v. H.J. Heinz Co.,* 246 F.3d 708, 715-17, 724-25 (D.C. Cir. 2001) (similar duopoly held presumptively unlawful). That presumption of illegality cannot be rebutted by the presence of a few "power buyers," where, as here, such buyers cannot secure through their actions competitive prices for smaller, less sophisticated or concerned purchasers (*Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 475-76 (1992); *Cardinal Health,* 12 F. Supp.2d at 60)), or the relevant product is an intermediate input for which a post-merger price increase could be passed along to final purchasers of the finished product, *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999). The United States's challenge to Alcan's proposal to acquire Pechiney thus was a principled exercise of its prosecutorial discretion, not open to collateral attack by the state in a Tunney Act proceeding. *United States v. Archer-Daniels-Midland Co.,* 2003-2 Trade Cas. (CCH) ¶ 74,097 at 96,872 (D.D.C. 2003).

should be charged in an antitrust complaint are entitled to considerable deference. As that court has warned, "[T]he Tunney Act cannot be interpreted as an authorization for a district court to assume the role of Attorney General." *United States v. Microsoft Inc.,* 56 F.3d 1448, 1462 (D.C. Cir. 1995). Responding to attempts by third-parties to obtain relief for antitrust violations that were not alleged in the government's complaint, the D.C. Circuit Court of Appeals has held that "[T]he court is only authorized to review the decree itself" and cannot "effectively redraft the complaint" to inquire into matters that the government might have but did not pursue. *Id.* at 1459-60. "Such limited review is obviously appropriate for a consent decree entered into before a trial on the merits because 'the court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion in the first place.'" *Commonwealth of Massachusetts v. Microsoft,* 2004 WL 1462298, 302 *(*D.C.Cir. June 30, 2004) (citation omitted). *See also United States v. Archer-Daniels-Midland Co.,* 2003-3 Trade Cas. (CCH) ¶ 74,097 at 96,872 (D.D.C. 2003) ("[C]ourt must accord due respect to the government's prediction as to the effect of the proposed remedies, its perception of the market structure, and its view as to the nature of the case. . . . [T]he court is not to review allegations and issues that were not contained in the government's complaint, . . . nor should it 'base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint . . .'") (citations omitted). *See generally, United Sates v. Alex Brown & Sons, Inc.,* 169 F.R.D. 532, 541 (S.D.N.Y. 1996) (In enacting the Tunney Act, "Congress wanted to remedy abuses in the consent decree process by focusing judicial and public scrutiny on the 'Justice Department's decision to enter into a proposal for a consent decree'. . . but not at the expense of eliminating the decree as a practical means of resolving antitrust matters" (citations omitted)).

Congress's recent amendments to the Tunney Act provide no broad support for forcing the United States to try the claims of a settled antitrust merger case. *See* Antitrust Criminal Penalties Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221, 118 Stat. 666, 669 (2004). The relevant provisions of the amended Tunney Act, 15 U.S.C. § 16(e), provide (new language italicized):

> Before entering any consent judgment proposed by the United States . . ., the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—The competitive impact of such judgment, including termination of the alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, *whether its terms are ambiguous,* and any other *competitive* considerations bearing on the adequacy of such judgment *that the court deems necessary to a determination of whether the consent decree is in the public interest; and (B) the impact of entry of such judgment upon competition in the relevant market or markets,* upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

Thus, in amending the Tunney Act, Congress stressed that courts should examine a proposed decree for ambiguities and focus their attention on the strictly "competitive" considerations that bear on the adequacy of the relief and the effect a proposed judgment may have on "competition in the relevant market." The recent Tunney Act amendments, in effect, endorse settled legal precedent in the District of Columbia Circuit that if the proposed decree is ambiguous, unenforceable, "positively" injurious to others, *or* makes a "mockery" of judicial power – *e.g.,* by mandating relief that would not alleviate the competitive ills alleged in the complaint – then the Court may decline to enter it. *Massachusetts School of Law at Andover, Inc. v. United States,* 118 F.3d 776, 783 (D.C.Cir. 1997).

Contrary to the state's contention (Mem. In Opp. at 14-15; Waldie Affidavit, ¶¶ 9-10), Congress never expected its clarifying amendments to the Tunney Act to be forged into a key that

would open up a Pandora's Box of complex litigation over the substance of the government's claims in a settled antitrust merger case. Rather, it very carefully sought to avoid the possibility of such an expansive interpretation by explicitly stating: "Nothing in [this section with its amendments] . . . . shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." Antitrust Criminal Penalties Enhancement and Reform Act, §221, 118 Stat. at 669.

Thus, in a proceeding to decide whether a proposed settlement should be entered by the Court under the Tunney Act, the United States need only show that the proposed relief lies within the "reaches of the public interest." *United States v. Bechtel Corp., Inc.,* 648 F.2d 660, 666 (9th Cir.), *cert. denied,* 454 U.S. 1083 (1981); *Massachusetts School of Law at Andover,* 118 F.3d 776, 783. Among other things, the Court is required to review the relationship between the relief in the AFJ and the allegations of the government's original Complaint. *Massachusetts School of Law at Andover,* 118 F.3d at 783. In this case, the amended settlement falls well "within the reaches" of the public interest, for it would alleviate competitive concerns generated by Alcan's proposal to combine two of the three major sellers of brazing sheet in North America by requiring Alcan promptly to divest one of its brazing sheet businesses, replacing competition that would have been lost through the acquisition. If Alcan chooses to divest Pechiney's brazing sheet business, its sale to a viable new owner would create another competitor in the North American brazing sheet market and leave competition no worse off after Alcan's acquisition of Pechiney than before it.

II. The AFJ Provides Sufficient Time to Complete the Mandated Divestiture.

West Virginia also contends that the AFJ is "defective" because it does not provide enough time for Alcan to divest either its own or Pechiney's brazing sheet business. The state speculates that in a "rush to divest," Alcan may sell Pechiney's brazing sheet business to an unsuitable buyer. This argument is invalid on a number of different levels.

The AFJ incorporates the common-sense notion that consumers will be better off if competition is quickly restored to the relevant market.[7] To that end, the AFJ provides Alcan an initial opportunity – up to 180 days after the filing of the AFJ or five days after its entry – to attempt to sell either of its brazing sheet businesses to an acceptable buyer. AFJ, § IV(A). If circumstances warrant, Alcan may receive up to 60 additional days to complete the mandated

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[7]The Federal Trade Commission's divestiture study does not support the state's notion that a "hasty" divestiture will create a new business prone to failure. Rather, the FTC concluded that divestitures that are quickly completed are more likely to be successful and minimize interim competitive harm. *A Study of the Commission's Divestiture Process* 39-40 (1999) (available online at *http://www.ftc.gov/os/1999/08/divestiture.pdf).* The FTC explained:

> In order to eliminate competitive harm, the Commission has greatly shortened the period by which a required divestiture must be completed in more recent orders. *The working rule now is that the divestiture must be accomplished within six months after the consent agreement is signed. Earlier orders typically gave the respondent 12 months or more from the date the order became final to divest.* To further reduce or eliminate interim harm by obtaining quicker divestitures, recent orders have required "up-front" divestitures. The up-front divestiture not only reduces the opportunity for interim competitive harm by expediting the divestiture process, but it assures at the outset that there will be an acceptable buyer for the to-be-divested assets.
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> The up-front divestiture policy shifts the costs of delaying the divestiture from the public to respondents. Typically, a respondent consummates its acquisition as soon as the Commission accepts an order for public comment. The respondent, thus, realizes the benefits of the merger immediately, while the to-be-divested assets tend to be less vigorously operated at least until the new owner takes over. Consequently, the respondent has little incentive to complete the divestiture before the end of the period allowed in the order.

divestiture. AFJ, § IV(A). If Alcan does not divest to a suitable buyer by the agreed-upon deadline (and any extensions), then a trustee may be appointed who will have at least six months to effectuate the mandated divestiture. AFJ, §§ V(B) and (G).

This proposed timetable is reasonable on its face, especially considering the fact that Alcan has been on notice for nearly a year that it may have to divest Pechiney's brazing sheet business to alleviate the anticompetitive effects of the acquisition.[8] The AFJ timetable also fully comports with divestiture deadlines imposed by the Court in similar recent merger cases in the aluminum industry[9] and with the FTC's "working rule" that an ordered "divestiture must be

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[8]The United States also has demonstrated reasonable flexibility in seeking compliance with the agreed-upon divestiture schedule. Under the earlier settlement, the government granted an Alcan request for more time to solicit and consider proposals from prospective buyers of Pechiney's brazing sheet business, and later agreed to amend that settlement to permit Alcan to meet its divestiture commitment by selling its own brazing sheet business.

[9]*See United States v. Alcoa, Inc.,* 2001-2 Trade Cas. (CCH) ¶73,435 (D.D.C. 2001) (J. Urbina) (180 days for sale of interest in alumina refinery in Texas; 270 days for sale of joint venture interest in massive bauxite mining and alumina refining operation in Australia); *United States v. Alcoa, Inc.,* 2000-2 Trade Cas. (CCH) ¶72,972 (D.D.C. 2000) (J. Hogan) (60 days for sale of aluminum rolling mill in Colorado); *United States v. Alcoa, Inc.,* 1999-1 Trade Cas. (CCH) ¶72,557 (D.D.C. 1998) (J. Friedman) (180 days for sale of cast aluminum plate manufacturing plant in California). Moreover, the proposed divestiture schedule is less onerous than those imposed upon defendants in recent cases resolving merger challenges in other manufacturing industries. *See United States v. DNH Int'l. Sarl,* 2004-2 Trade Cas. (CCH) ¶74,479 (D.D.C. 2004) (J. Kessler) (90 days to divest industrial grade ammonium nitrate plant); *United States v. General Electric Co.,* 2004-1 Trade Cas. (CCH) ¶74,313 (D.D.C. 2003) (J. Lamberth) (120 days to divest mobile floroscopic X-ray machine and patient monitoring equipment making businesses); *United States v. Manitowoc Co., Inc.,* 2003-1 Trade Cas. (CCH) ¶73,955 (D.D.C. 2002) (J. Lamberth) (150 days to divest boom truck manufacturing concern); *United States v. Volvo AB,* 2001-1 Trade Cas. (CCH) ¶73,318 (D.D.C. 2001) (J. Sullivan) (90 days to divest low cab-over-engine truck manufacturing firm); and *United States v. Ingersoll-Rand, Inc.*, 2001-1 Trade Cas. (CCH) ¶73,154 (D.D.C. 2001) (J. Jackson) (150 days to divest plant that manufactures large pumps used in oil refining and power generation operations).

accomplished within six months after the consent agreement is signed." *A Study of the Commission's Divestiture Process* at 39.

There is no substance to the state's charge that the AFJ may cause Alcan to hastily sell the Pechiney brazing sheet business to an unsuitable buyer. Under the terms of the AFJ, that enterprise may only be sold to a purchaser who is demonstrably capable of successfully competing as part of a "viable, ongoing" enterprise engaged in the development, production, and sale of brazing sheet in North America. AFJ, § IV(J). If a prospective buyer is unable to prove to the government's satisfaction that it has the "managerial, operational, and financial capability" to be an effective competitor (*id.*), then Pechiney's brazing sheet business will not be divested to that firm, no matter how pressed Alcan may be to complete the sale before the decree-imposed deadline.

Nor is there any merit in the state's extraordinary suggestion (Mem. In Opp. at 15-16) that if Alcan fails to divest Pechiney's brazing sheet business to a suitable buyer, then Alcan should be permitted to retain it without recourse to a selling trustee. The state mistakenly presumes that Alcan harbors an incentive to quickly restore the market competition lost through its acquisition of Pechiney. As the FTC has found, however, where, as here, a defendant has "realize[d] the benefits of the merger immediately . . . the to-be-divested assets tend to be less vigorously operated at least until the new owner takes over. Consequently, the [defendant] . . . has little incentive to complete the divestiture before the end of the period allowed in the order." *A Study of the Commission's Divestiture Process* at 39. The state's novel proposal[10] to leave control of the mandated divestiture entirely in defendants' hands runs the very real risk that Alcan could end

[10]The United States is unaware of any provision in any judgment entered in any recent antitrust case that would permit a defendant to retain, with no government recourse to a selling trustee, assets ordered divested pursuant to the decree.

up retaining Pechiney's brazing sheet business because it has demanded more for that business than what it is actually worth or has proposed selling it to unqualified buyers (*id.* at 17) or on terms that would adversely affect a buyer's future competitive viability (*id.* at 23).[11]

To its credit, the AFJ protects the public against such gamesmanship by ensuring that if Alcan's divestiture efforts should fail, the United States may seek appointment of an independent trustee to complete the mandated divestiture to a suitable buyer "at such price and on such terms as are then obtainable upon reasonable effort." AFJ, §§ V(A) and (B). If neither Alcan nor the trustee can find an acceptable buyer for Pechiney's brazing sheet business, then the Court would remain free under the AFJ to consider what additional measures should be taken, presumably including whether to relieve Alcan of its divestiture obligation. AFJ, § V(G).

III. The AFJ Appropriately Requires The Sale of Pechiney's Brazing Sheet Business To a Purchaser Who Will Continue to Compete in the Relevant Market.

West Virginia contends that the proposed AFJ "misrepresents the Ravenswood plant and its markets" by "erroneously focus[ing] exclusively on the brazing sheet product line." Mem. In Opp. at 5-6. In the state's view, a divestiture of "Pechiney's brazing sheet business" will not produce a viable competitor capable of long-term survival because the AFJ does not require Alcan to divest all assets used by Pechiney to develop, produce, and sell other important rolled aluminum products (*e.g.,* aerospace sheet, common alloy coil) made at the Ravenswood aluminum rolling mill.

The short answer to this contention is that if Alcan elects to sell "Pechiney's brazing sheet business," then the AFJ would require it to divest not just those portions of the Ravenswood mill committed to brazing sheet, but any and all tangible and intangible assets employed in

[11]*See* AFJ, § IV(J): Divestiture terms must not give the defendants "the ability unreasonably to raise the [new firm's] costs, to lower [its] . . . efficiency, or otherwise to interfere in . . . [its] ability . . . to compete effectively."

developing, producing, or selling any product made at Pechiney's Ravenswood aluminum rolling mill, as well as any research, development, or engineering facility, "wherever located," used to develop or produce any such product. *See* AFJ, §§ II(E)(1)-(3). In short, the AFJ broadly requires Alcan to provide the new owner of "Pechiney's brazing sheet business" with every tangible and intangible asset (including rights to foreign intellectual property) in defendants' possession previously used by Pechiney to compete in developing, making, and selling not just brazing sheet, but any other rolled aluminum products made at the Ravenswood rolling mill, including common alloy coil and aerospace aluminum plate.

The AFJ not only ensures a complete divestiture of every tangible and intangible asset previously used by Pechiney to produce each of Ravenswood's many rolled aluminum products, but it also contains sensible guarantees that the prospective purchaser will continue using these assets as part of a "viable, ongoing" business enterprise capable of successfully competing against Alcan and others. *See* AFJ §§ IV(J) and V(B).[12] The AFJ mandates that Pechiney's brazing sheet business may only be sold to a buyer who can demonstrate, to the United States's sole satisfaction, that those assets "can and will be used . . . as part of a viable, ongoing business, engaged in developing, manufacturing, and selling brazing sheet in North America." AFJ, § IV(J). A prospective purchaser must not only convince the United States that "Pechiney's brazing sheet assets" "will remain viable" and will be operated in such a manner as to "remedy the competitive harm alleged in the Complaint," but also that the buyer possesses the

[12]"[D]ivestiture of an ongoing business is more likely to result in a viable operation than divestiture of a more narrowly defined package of assets and provides support for the common sense conclusion that [antitrust enforcement agencies] should prefer the divestiture of an ongoing business." *A Study of the Commission's Divestiture Process* at 12.

"managerial, operational, and financial capability to compete effectively" (AFJ, § IV(J)(1)) and is not tied to any agreement that would interfere with its ability to compete (AFJ, § IV(J)(2)).[13]

There is no reasonable basis for the state's assertion that Pechiney's brazing sheet business can only survive if it remains in the hands of a dominant brazing sheet manufacturer, such as Alcan.[14] This "failing firm" defense to an otherwise severely anticompetitive transaction can succeed only after a compelling demonstration that every effort has been made to divest Pechiney's brazing sheet business to an alternative purchaser that poses less of a threat to competition and that the resources of Pechiney's brazing sheet business are so depleted and its future prospects are so bleak, that it cannot be successfully reorganized in a Chapter 11

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[13]The state appears to believe that the government's focus on the restoration of competition to the brazing sheet market might lead it to approve a prospective purchaser qualified to make that product, but who lacks the desire or expertise to capably produce Ravenswood's other rolled aluminum products. Intervenor's Amended Complaint, ¶¶ 12, 14. As noted above, the AFJ would provide that buyer all assets necessary to produce the other products. A buyer who lacks an interest in making those products could not convince the United States that it would be a suitable purchaser under the AFJ. Aside from that minor point, however, the state's broad concern for how the proposed divestiture could affect competition in markets for other rolled aluminum products (Intervenor's Amended Complaint, ¶¶ 9 and 11) is simply misdirected. *See United States v. Archer-Daniels-Midland Co.,* 272 F. Supp.2d at 10 ("[T]he court is not to review allegations and issues that were not contained in the government's complaint, . . . nor should it 'base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint'"); *United States v. Pearson PLC,* 55 F. Supp.2d 43, 45 (D.D.C. 1999). The recent amendments to the Tunney Act make it clear that the public interest determination should be focused on how the AFJ will affect competition in the relevant market alleged in the Complaint.

[14]The state is convinced (Mem. In Opp. at 15-16) that Alcan must retain Pechiney's brazing sheet business under any circumstances because, in the state's view, Alcan is more likely than any other owner to maintain current levels of employment and benefits at the Ravenswood rolling mill. This concern is both factually and legally misplaced. As a factual matter, a firm that acquires market power through acquisition likely will compete less vigorously, sell less product, and hence will risk a *reduction* in premerger employment levels. As a legal matter, the antitrust laws seek to protect competition, not employment levels in a given region of the country.

bankruptcy proceeding. *Citizens Pub. Co. v. United States*, 394 U.S. 131 (1969); *FTC v. Harbour Group Investments, LP*, 1990-2 Trade Cas. (CCH) ¶ 69,247 (D.D.C. 1990). *See generally*, U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* ¶ 5.2 (1992 ed.); Areeda, Hovenkamp, and Solow, *Antitrust Law* ¶ 952 (rev. ed.).

In this case, one would be very hard-pressed to adopt West Virginia's conclusion that any effort to divest Pechiney's brazing sheet business will fail to produce an acceptable, viable new owner capable of vigorous competition against Alcan and others when neither Alcan nor a trustee has completed a search for, and any negotiations with, all prospective purchasers of Pechiney's brazing sheet business.[15] It would be clear error to reject the proposed AFJ on the basis of speculative fears[16] that an alternative purchaser will not turn up when the reasonable canvass the parties envisioned in the AFJ has not been allowed to run its course. *Citizens Publishing Co. v. United States*, 394 U.S. at 138; *Dr. Pepper/Seven Up Cos. Inc. v. FTC*, 991 F.2d 859, 864-66

[15]Nor, for that matter, has it been shown that the resources of Pechiney's brazing sheet business are so depleted that it would not survive a Chapter 11 proceeding. Also, one cannot assume, as several commenters have, that defendants' legacy costs will automatically scare off any potential purchasers of the Ravenswood facility. Whether a prospective buyer will assume none, some, or all of the facility's legacy costs is, in our view, a matter of negotiation between the prospective buyer and Alcan (or if need be, the trustee). It should be noted, however, that under the proposed amended decree, an "acceptable purchaser" of Pechiney's brazing sheet business should not be a firm so burdened by its former owners' legacy costs that it would not be viable, ongoing enterprise. *See* AFJ, § IV(J): Divestiture terms must not give the defendants "the ability unreasonably to raise the [new firm's] costs, to lower [its] . . . efficiency, or otherwise to interfere in . . . [its] ability . . . to compete effectively."

[16]The state's fears that any divestiture of the Pechiney brazing sheet business will lead to a plant closure and local unemployment is predicated on a very long series of speculative "ifs": *if* Alcan elects to divest the Pechiney brazing sheet business; *if* it and a trustee are both unsuccessful in finding a suitable buyer for the divested assets; *if* a suitable buyer is found, but is later unable to compete; and *if* a buyer chooses to reduce local wages and retiree benefits, then – and only then – may employment opportunities and benefits of West Virginia residents be affected by the relief in the AFJ.

(D.C. Cir. 1993) ("good faith attempt to locate an alternative buyer" must be pursued before anticompetitive acquisition of failing firm may be allowed); *FTC v. Harbour Group Investments*, 1990-2 Trade Cas. (CCH) ¶ 69,247 at 64,915-17 (burden of proving anticompetitive acquirer is "only" purchaser available is "quite heavy"). *See generally*, *Horizontal Merger Guidelines* ¶ 5.2; *Antitrust Law* ¶ 952. As noted above, if neither Alcan nor the trustee can find an acceptable buyer for Pechiney's brazing sheet business, then the Court has the power under the AFJ to consider what, if any, additional measures should be taken. AFJ, § V(G). *See Dr. Pepper/Seven Up Cos. Inc.*, 991 F.2d at 864-66.

IV. The Proposed AFJ Should Not Guarantee Employment in West Virginia.

West Virginia contends that entry of the AFJ would not be in the public interest because it does not "sufficiently guard" against the possibility that any new owner of Pechiney's brazing sheet business might attempt to "avoid pension obligations" or later decide to close the Ravenswood plant. Mem. In Opp. at 3-4. The state's parochial interest in writing into the pending consent decree future guarantees of employment and benefits for its residents is not legally cognizable under the Tunney Act. The recent amendments to that Act make it clear, in no uncertain terms, that what matters in ascertaining whether the AFJ's relief is in the public interest are the "*competitive* considerations bearing on the adequacy of such judgment" and "*the impact of entry of such judgment upon competition in the relevant market* . . . [and] upon the public generally . . . . *from the violations set forth in the complaint*. . . ." 15 U.S.C. § 16(e) and Antitrust Criminal Penalties Enhancement and Reform Act, §221, 118 Stat. at 669 (emphasis added). Where, as here, the proposed divestiture relief in a pending decree would fully alleviate competitive problems alleged in the government's Complaint, it would be in the public interest to enter the decree.

Moreover, it would be unwise as a matter of policy to use this Tunney Act proceeding as a procedural mechanism for writing a decree that tampers with current labor agreements and pension benefits at Pechiney's Ravenswood rolling mill. The labor agreement that covers most employees at that facility is scheduled to expire next year. What a prospective buyer should pay those employees is a matter that should remain strictly between defendants, the buyer, and the employees and retirees of Pechiney's brazing sheet business. It would be highly inappropriate for the United States, West Virginia – or the Court – to inject themselves into the matter by writing into the AFJ a guaranty of future employment or pension benefits. This is especially true here, since the state has suggested that so-called "legacy" costs (retiree pension and health care benefits) already may have had a role in hindering the Ravenswood rolling mill's ability to compete effectively. *See* Mem. In Opp. at 3. *Compare United States v. Stroh Brewery Co.,* 1982-2 Trade Cas. (CCH) ¶ 64,782, 71,829-30 (D.D.C. 1982) (denying permissive intervention by unions to protect "job security" and "employment opportunities" where it would "shift attention" from court's public interest determination under Tunney Act to original parties' decision to forego litigation and settle the antitrust merger case).

The proposed AFJ also should not expressly prohibit a prospective purchaser of Pechiney's brazing sheet business from ever closing the Ravenswood facility. Pechiney faced no such court-imposed constraint before its acquisition by Alcan. A successful divestiture will create a business enterprise that replaces competition that would otherwise be lost through an anticompetitive merger, but like any business enterprise, the divested firm should be permitted to prosper or fail on its own competitive merits. In any event, it is highly unlikely that a buyer, having paid millions of dollars to obtain the Ravenswood rolling mill, would soon afterward compromise the value of its investment by closing the plant and idling its workers. Before

pursuing such an alternative, any reasonable buyer will likely do everything within its power to maximize the return on its investment while maintaining the plant as part of a viable, ongoing business enterprise.

CONCLUSION

For the foregoing reasons, the United States urges the Court to conclude that entry of the proposed AFJ would be in the public interest and to enter the AFJ promptly.

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Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Anthony E. Harris, hereby certify that on September 20, 2004, I caused copies of the foregoing United States's Reply to Intervenor State of West Virginia's Opposition to the Proposed Amended Final Judgment to be served by mail by sending them first-class, postage prepaid, to duly authorized legal representatives of those parties, as follows:

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